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IN THE

Supreme Court of the United States

October Term, 1957.

No. 585

THEODORE C. BONNEY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Theodore C. Bonney, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit, entered on August 2, 1957.

Opinions Below.

The Tax Court's opinion is reported in 24 T.C. 199 (Sub. Nom. *Towers v. Comm.*, reproduced in pertinent part at Appendix[1] 3a, *et seq.*). The opinion of the Court of Appeals (copy attached hereto) is reported in 247 F. 2d 237.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 2, 1957. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

[1] Appendix to petitioner's brief used below and filed herein.

Questions Presented.

(1) Where petitioner had been induced to marry Edna Wheaton in New York State in 1937 through her fraudulent concealment that she had been previously divorced in New York State for adultery and of the unmodified decree prohibiting her remarriage in New York; and petitioner, during the married years, gave money and property to Edna before he discovered the concealment in 1945; and New York law holds (and the New York Court so declared) the marriage to be void and nondisclosure of her disability to constitute fraudulent concealment entitling petitioner to maintain an action against his supposed wife in fraud and deceit to recover for the damages sustained; and the substantive elements necessary to sustain such an action are the same as those required in a criminal fraud case—was the Court of Appeals correct in holding in effect that a deduction for the money and property parted with was properly disallowed as a loss from theft (larceny by false pretenses) on the ground that petitioner had failed to prove fraud beyond a reasonable doubt?

(2) Was the Tax Court's determination as to whether the undisputed facts gave rise to a theft under local law a finding of fact within the meaning of the "clearly erroneous" rule as the Court of Appeals held or was it a conclusion of law, the correctness of which should have been independently reviewed by the Court of Appeals?

Statutes and Rules Involved.

Internal Revenue Code of 1939.

Section 23:

> "Deductions from Gross Income. In computing net income there shall be allowed as deductions: * * * (e) Losses by individuals.—In the case

of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise— * * * (3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft."

Domestic Relations Law of New York:

"Sec. 6. VOID MARRIAGES.—A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either;

"1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person; provided, that if such former marriage has been dissolved for the cause of the adultery of such person, he or she may marry again in the cases provided for in section eight of this chapter and such subsequent marriage shall be valid; * * *."

"Sec. 8. MARRIAGE AFTER DIVORCE FOR ADULTERY.—Whenever a marriage has been or shall be dissolved, the complainant may marry again during the lifetime of the defendant. But a defendant for whose adultery the judgment of divorce has been granted in this state may not marry again during the lifetime of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall be made only upon satisfactory proof that three years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good; * * *."

"Sec. 57. A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. * * * A married woman has a right of action against her husband for his wrongful or tortious acts * * * resulting in injury to her property, as if they were un-

married, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or to his property, as if they were unmarried."

New York Penal Law:

"Sec. 1290. A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

"Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:

"1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token or writing; or

* * * * * *

"3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property or with possession as well as title.

* * * * * *"

Federal Rule of Civil Procedure 52(a):

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses * * *."

Statement.

The Tax Court of the United States rendered a decision on March 26, 1956, determining deficiencies in the petitioner's Federal income tax for the years 1944 through 1947 as follows:

1944	$ 290.47
1945	11,576.53
1946	1,138.79
1947	2,560.31

The case was consolidated below for hearing with the following: Samuel Towers, Docket No. 28753; Albert Towers, Docket No. 28754; Albert Averbach, Docket No. 28779 and David M. Hayman, Docket No. 28816, but was severed on appeal to the Second Circuit. The Tax Court decision was affirmed in all respects.

Only one of the six distinct issues below are raised here. The facts were undisputed.

In August, 1937, petitioner went through a ceremonial marriage with Edna Wheaton and the twain lived together as man and wife until April, 1945. Edna formerly had been married on June 6, 1921, and was divorced in the State of New York in March, 1922. The decree of divorce had been granted on the ground of her adultery and she was prohibited from remarrying in the State of New York during her former husband's lifetime without a special decree from the Supreme Court of the State of New York.[1] On the date of the ceremonial marriage of Bonney and Edna, the former husband was still alive, and no order had been issued by the Supreme Court of the State of New York to permit Edna to remarry.

At the time of his marriage to Edna, Bonney was not aware that she had been married previously, or that she

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[1] Domestic Relations Law, Sec. 8, page 3, *supra*.

had been divorced and prohibited from remarrying. He became suspicious in April, 1945 (see App. 67a for circumstances), and caused an investigation to be made. After ascertaining the facts, sometime in the early part of May, 1945, petitioner separated from Edna and commenced an action in the New York Supreme Court on October 25, 1945, for a judgment declaring his marriage a nullity. A trial was held at which Edna was present and represented by counsel, and Bonney was granted judgment on April 7, 1947, declaring the marriage void in accordance with Section 6 of the Domestice Relations Law of New York,[2] which provides that such a marriage is bigamous (App. 40a-41a).

From 1937 until about May 1, 1945, petitioner believed himself to be lawfully married to Edna Wheaton during which time she obtained from him the following amounts of money for clothing and spending money:

1937	$ 225.80
1938	1,187.69
1939	621.58
1940	1,402.17
1941	1,785.01
1942	3,333.34
1943	7,171.29
1944	4,268.70
1945	3,908.50
	$23,904.08

Petitioner completely remodeled and rebuilt the house and buildings on a farm at an expense of $13,000 which he deeded to himself and her, as tenants by the entirety. He would not have given her these things had he known the true facts affecting the validity of the marriage (App. 61a). Bonney accordingly took deductions for the above

[2] Page 3, *supra*.

as monies and property obtained by fraud amounting to theft under Section 23(e)(3).[3] The Courts below upheld the Commissioner's disallowance on the ground that the facts did not give rise to a theft under the New York cases.

Reasons for Granting the Writ.

A. Although petitioner under New York Law could have maintained a civil action in fraud and deceit against his supposed spouse to recover for the money and property parted with, and the substantive elements necessary to maintain such an action are the same as those in a criminal fraud case, yet the Court of Appeals in effect held that the deduction was properly disallowed since fraudulent intent was not proved beyond a reasonable doubt. That holding on an important question of statutory construction is unprecedented, the propriety whereof should be settled by this Court.

B. The Court of Appeals characterized the Tax Court's determination that the undisputed facts did not give rise to a theft under local law as a finding of fact and improperly confined the scope of its review thereof by the "clearly erroneous" criterion. Instead that determination is a conclusion of law meriting an independent review; the Court of Appeals' contrary holding conflicts with the Sixth Circuit and constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Alternatively the applicability of the "clearly erroneous" rule is a question which has not been but should be settled by this Court.

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[3] Page 2, *supra*.

The Court of Appeals assumed, *arguendo*, that the losses if allowable at all could be deducted in the year of discovery, citing *Alison v. U. S.* (344 U. S. 167, 73 S. Ct. 191, 97 L. Ed. 186).

The question of whether or not the circumstances amount to theft depends, of course, upon the law of the State of New York.[4] Section 1290 of the New York Penal Law provides:

> "A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.
>
> "Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:
>
> "1. The accused obtained possession of, or title to such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token or writing; or
>
> * * * * * *
>
> "3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property or with possession as well as title."

The New York cases hold that a failure on the part of a prospective spouse to disclose a prior marriage, which disables him from contracting the projected marriage,

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[4] Although in New York one spouse may be guilty of theft against the other (*People v. Morton*, 308 N. Y. 96), this question does not arise here since the New York court decreed the marriage to be void and hence that the parties were never husband and wife. Nor is a decree necessary for that effect. (*Wehner v. Wehner*, 66 N. Y. S. 2d 703.)

constitutes fraudulent concealment (*Roth v. Roth*, 97 Misc. 136, 161 N. Y. S. 99), which will give rise to an action on that theory for damages (*Kujek v. Goldman*, 150 N. Y. 176; *Amsterdam v. Amsterdam*, 56 N. Y. S. 2d 19; N. Y. Domestic Relations Law, Section 57[5]), and a criminal action for larceny by false pretenses (*Peo. v. Lehrer*, 182 Misc. 645, 45 N. Y. S. 2d 170).

The Court of Appeals seemed to think that the *Lehrer* case is distinguishable. The only distinction is that there the defendant obtained one sum of money from the complainant and did not go through a marriage ceremony, while here Edna did go through the marriage ceremony and obtained various amounts of money thereafter. In both cases the fraudulent representation was the same, namely, that the deceiver was competent to marry and in both the deceived parted with money in reliance.

The Courts below seemed to feel that all the elements necessary to satisfy the larceny statute had been shown save one, namely, fraudulent intent. The Tax Court said: "* * * (T)here is no evidence that she went through the form of marriage with the intent and purpose of obtaining from Bonney the monies in question which he turned over to her during the years 1937 to 1945, inclusive" (App. 44a). This simply disregards the undisputed facts and the rubrics of criminal law. "* * * the general basis of criminal liability (is) knowledge, at the time of action, of facts from which common experience showed that certain harmful results were likely to follow" (Holmes, *Common Law*, pp. 130-131). Edna knew when she purported to marry petitioner in 1937 that she could not lawfully do so. She concealed this fact from him. She also knew upon entering the supposed marriage that in the normal course of events her "husband" would thereafter give money or its worth to her in the continued

[5] Page 3, *supra*.

belief in her false representation. The law deems therefore that she had the intent to bring about what normally would follow. "Acts should be judged by their tendency under the known circumstances, not by the actual intent which accompanies them" (Holmes, *The Common Law*, p. 66). Moreover, Edna's concealment after the ceremony and during their "married" life amounted to a continuing fraud, as a result of which petitioner gave her substantial sums from 1937 to 1945. He would not have done so but for her fraud.

To say, as the Tax Court does (App. 44a, 45a), that "the money was willingly turned over to Edna" or that petitioner "voluntarily" undertook her support overlooks completely the fraudulent act which induced the turnover. The Court might as reasonably describe every swindle in the same terms. Money extracted by fraud or false pretenses is always "willingly" turned over in the same sense that it is not physically wrested from the hands of the victim. But concededly the deduction is no less allowable in the one case than in the other (*Curtis H. Muncie*, 18 T. C. 849; *Edwards v. Bromberg*, 231 F. 2d 107 [C. C. A. 5]). Indeed, the New York Penal Statute (Sec. 1290, Penal Code, *supra*) defines the crime of larceny to include such "willing" parting with funds. Moreover,

> "It is not necessary that the false pretense of a past or existing fact alleged to have been made should be the sole inducement by which the property in question is parted with, if it had a preponderating influence, sufficient to turn the scale, although other considerations operated upon the mind of the complainant. And this is true even though the complainant would not have surrendered her property solely on the pretenses alleged" (*Peo. v. Lehrer*, *supra*, 182 Misc. 645, 45 N. Y. S. 2d 170, 172).

The Court of Appeals concurred with the Tax Court on the question of intent thus:

> "But no case has been cited holding that the criminal intent necessary for conviction of the crime of larceny must be inferred from a ceremonial marriage contracted by a disqualified spouse."

The Court conceded that under the authority of *Kujek v. Goldman* (*supra*, 150 N. Y. 176) the petitioner was entitled to bring an action for fraud and deceit against his putative wife and recover damages for the money and property turned over to her by reason of the deception.[6] But it is elementary that "Intentional fraud * * * is an essential factor in an action for deceit" (*Kountze v. Kennedy*, 147 N. Y. 129)[7] as well as in a criminal action for larceny by false pretenses. And

> "* * * the whole meaning of the requirement (of intent in an action for deceit) is, that the natural and manifest tendency of the representation, under the known circumstances, must have been to induce the opinion that it was made with a view to action, and so to induce action on the faith of it. The standard of what is called intent is thus really an external standard of conduct under the known circumstances, and the analysis of the criminal law holds good here" (Holmes, *Common Law*, p. 134).

Thus, in either a civil or criminal case intent as externally viewed and not as subjectively held is the test. The only difference between the two types of action (in addition to the requirement that in a criminal case the defendant must have obtained money or property as a result of the deception) lies in the quantum of proof required. In

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[6] It was held there that "there was a wrongful act in the fraud, that was followed by lawful damages and the loss of money and services" (at page 179).

[7] "The law affords (other) remedies for * * * innocent misrepresentation" (IBID). New York is among the majority of states which follow *Derry v. Peek*, 14 A. C. 337, 58 L. J. Ch. 864.

the light of this the Court of Appeals decision must mean that in order to justify a deduction for theft loss the proof thereof must measure up to the beyond-a-reasonable-doubt criminal standard.[8] Surely this is an unduly restrictive application of the code provision. Every other case that has been decided in connection with a theft loss deduction has in accordance with the civil standard simply required a preponderance of proof. Which is the proper standard then is the important question of federal law which has not been but should be settled by this Court.

An additional point merits this Court's review. The Court of Appeals opinion reads:

> "The taxpayer has the burden of showing by 'clear and convincing proof' that the local law supports his contentions (see *Helvering v. Fitch*, 309 U. S. 149, 156; *Helvering v. Leonard*, 310 U. S. 80, 86). We cannot say that the Tax Court's finding that he had not carried this burden was clearly erroneous."

This is an indirect way of saying that the Tax Court's determination as to whether a theft occurred under local law constitutes a finding of fact within the meaning of the "clearly erroneous" rule. Thus characterized, it did not receive a plenary review which it would otherwise merit as a question of law. The upshot is that, because local law is not as definitive as it might be, the Court of Appeals did not really decide the question of theft for itself. Although "the State law problem here is not an easy one * * *, the difficulty involved did not relieve the Court of Appeals of its duty to make a decision" (*Spiegel v. Commissioner*, 335 U. S. 701, 707, 69 S. Ct. 301, 304, 93 L. Ed. 330). Nor do the cases cited by the Court relieve it of that duty. Merely because the

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[8] Cf. The Court's statement under the second issue that "the taxpayer has not met his burden of showing that under New York law Edna could be convicted of larceny on these facts."

Fitch and *Leonard* cases speak of "proof" of local law does not mean that a determination of such law amounts to a finding of fact under Rule 52(a). It is evident in both cases (particularly from the exhaustive analysis of the local cases made in *Fitch*) that the Court did in fact independently review the question as to the effect of local law. In *Leonard* it was observed that:

> "the Circuit Court of Appeals held that under New York law the terms of the trust would not be changed 'unless the wife can disaffirm it for fraud, overreaching or the like.' * * * If the case was here on application of local law under the rule of *Erie v. Tompkins* * * * we would not be inclined to disturb that finding. But it is not" (310 U. S. at pp. 85-86, 84 L. Ed. 1087 at pp. 1091-1092).

The Court accordingly did go on to overturn that "finding." And properly so. For the Appellate Court (at least, the Court of Appeals) is in just as good a position to determine state law as the lower Court and hence the reason behind Rule 52(a) simply doesn't obtain in this type situation.[9] So here, the effect of local law on the question of theft is surely a question of law and it is well settled that the clearly erroneous rule does not apply to a conclusion of law (*Bogardus v. Comm.*, 302 U. S. 34, 39, 58 S. Ct. 61, 82 L. Ed. 32; *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 394, 68 S. Ct. 525, 92 L. Ed. 746). The Court of Appeals' holding to the contrary conflicts with the Sixth Circuit [10] and constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. At least the applicability of the "clearly erroneous" rule is a question which has not been but should be settled by this Court.

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[9] Cf. *Claridge v. Comm.*, 323 U. S. 141, 145, 65 S. Ct. 172, 176, 89 L. Ed. 139; *Orvis v. Higgins*, 180 F. 2d 537, 538-540 (2 Cir.).

[10] *Chertoff, et al., v. Commissioner*, 160 F. 2d 691: "It seems clear from the authorities referred to above that the law governing the relationship of guardian and ward is local in its nature and presents a clear-cut question of law reviewable by this Court" (p. 696).

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 208—October Term, 1956.

(Argued May 16, 1957 Decided August 2, 1957.)

Docket No. 24273.

THEODORE C. BONNEY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before:

CLARK, Chief Judge,
SWAN and POPE, Circuit Judges.

Petition to review a decision of the Tax Court of the United States, 24 T. C. 199, determining deficiencies in petitioner's income taxes for each of the years 1944 to 1947 inclusive. Affirmed.

Victor G. Mount, Attorney for Petitioner; John J. Nicit, of Counsel.

Charles K. Rice, Assistant Attorney General, Lee A. Jackson, I. Henry Kutz and L. W. Post, Attorneys, Department of Justice, for Respondent.

SWAN, Circuit Judge:

In the Tax Court, Bonney's petition was consolidated for hearing with the petitions of four other taxpayers

and all five cases were disposed of in one opinion reported in 24 T. C. 199. The appeals of the taxpayers other than Bonney have been decided in an opinion, *Towers v. Commissioner*, handed down herewith.

Bonney's appeal asserts six errors. Three of them present the same questions decided as Issues 4, 5 and 8 in the opinion below and discussed in *Towers v. Commissioner*. As to them, nothing further need be said. The three other alleged errors are peculiar to Bonney's case and will be discussed in this opinion.

In 1947 Bonney spent $681.96 for repairing storm damage to the roof of a house he occupied under lease. He was under no obligation to make the repair. He claimed this amount as a loss deductible under Section 23(e)(3) of the 1939 Internal Revenue Code. The Tax Court denied the deduction—Issue 12 of its opinion. It reasoned that Section 23(i) provides the basis for determining the amount of deduction for losses under Section (3) "shall be the adjusted basis provided in Section 113(b) for determining the loss from the sale or other disposition of property," and there is nothing in the record from which it could determine either "what that basis was, or whether the loss exceeded such basis."[1] The taxpayer contends that the amount of the repair bill should have been taken as proof of the amount of the loss. Concededly there is nothing in the code expressly authorizing it. The casualty loss affected the value of both the lessee's interest and the landlord's reversion. The loss must be apportioned between them. The Tax Court was correct in rejecting the contention that the repair bill measured the tenant's loss.

It is next asserted that the Tax Court erred in holding that payments made by Bonney to his putative wife were not deductible under Section 23(e) as losses arising from

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[1] Cf. *Helvering v. Owens*, 305 U. S. 468; *United States v. Kosiland*, 9 Cir., 208 F. 2d 636, 639, note 3.

theft. The facts are stated in detail under Issue 13 of the opinion below. A brief summary will suffice here. In 1937 Bonney went through a marriage ceremony in the State of New York with Edna Wheaton, who had previously been divorced by a New York decree which prohibited her remarriage within the State. She concealed this fact from Bonney. In 1945 he discovered it. Thereupon he separated from Edna, started a proceeding to procure annulment of the putative marriage, and in his 1945 income tax return claimed deduction of the amounts of money he had given her for clothing and spending money during the years he believed himself lawfully married to her.[2] The issue is whether the taxpayer has proved that he was the victim of larceny as defined in Section 1290 of the New York Penal Code.[3] To constitute the crime of larceny by false pretense there must be proof of a criminal intent to deprive and defraud the owner of his property. *People v. Lehrer*, 45 N. Y. S. 2d 170, 172. The Tax Court was of opinion that "there is no evidence that she (Edna) went through the form of marriage with the intent and purpose of obtaining from Bonney the monies in question * * * Upon consideration of all the circumstances, we do not think that her acceptance of such monies constituted theft within the meaning of the New York Statute."

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[2] *Arguendo* it may be assumed that the losses, if allowable at all, could be deducted in the year of discovery. See *Alison v. United States*, 344 U. S. 167.

[3] This provides that

> "A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, * * * wrongfully takes, obtains or withholds, * * * any money, * * * or article of value of any kind, steals such property and is guilty of larceny."

The section further provides that it is no defense to a prosecution for larceny that:

> "1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token or writing; or
>
> "3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title; * * *."

The taxpayer contends that this conclusion does not square with the New York decisions. But the cases relied upon do not establish the contention. It is true that a failure on the part of a prospective spouse to disclose a prior marriage, which disables him from contracting the projected marriage, renders the latter void *ab initio*. *Roth v. Roth*, 161 N. Y. S. 99. It also gives rise to an action for damages, which may include amounts laid out for support of the putative wife during the supposed marriage. *Kujek v. Goldman*, 150 N. Y. 176; *Amsterdam v. Amsterdam*, 56 N. Y. S. 2d 19. But no case has been cited holding that the criminal intent necessary for conviction of the crime of larceny must be inferred from a ceremonial marriage contracted by a disqualified spouse. Cf. *People v. Lehrer, supra*. The taxpayer has the burden of showing by "clear and convincing proof" that the local law supports his contentions.[4] We cannot say that the Tax Court's finding that he had not carried this burden was clearly erroneous.

The final contention, Issue 14 of the opinion below, relates to the denial of a deduction claimed by Bonney in 1947 on account of money and property transferred to Edna to cause her to cease making derogatory accusations against him which were adversely affecting his professional reputation as a lawyer. The deduction was claimed as losses by theft or, alternatively, as ordinary and necessary business expenses. Under neither theory is it sustainable. The taxpayer has not met his burden of showing that under New York law Edna could be convicted of larceny on these facts. The common meaning of "theft" does not include extortion. Nor was the payment an ordinary business expense, even assuming it to have been necessary for the protection of Bonney's law practice. See *Welch v. Helvering*, 290 U. S. 111, 114.

Decision affirmed.

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[4] See *Helvering v. Fitch*, 309 U. S. 149, 156; *Helvering v. Leonard*, 310 U. S. 80, 86.